No. 86-763

IN THE

Supreme Court of the United States

October Term, 1986

W. NYLES SPURLOCK,

Petitioner,

v.

LOIS E. WREN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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A. RESPONDENT FAILS TO ADDRESS THE DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT.

Respondent, Lois E. Wren, in her Brief in Opposition focuses precisely on the resulting erosion of this Court's prior holdings in *Pickering v. Board of Education,* 391 U.S. 563 (1968), and *Connick v. Myers,* 461 U.S. 138 (1983), that will arise if the dangerous precedent established by the Tenth Circuit is left unaddressed. Wren argues that the action of the school board in deciding to renew Wren's contract (while reprimanding her) constituted the "dispositive fact" in resolving the *Pickering* balancing test; thus, "there is no room for a federal court to strike the balance

differently . . . (a)nd the government interest to be balanced under *Pickering* ends with that determination" (Brief in Op., pp. 11-12). Wren's position highlights the harm that can result from the Tenth Circuit's misapplication of the *Pickering* balance in direct conflict with this Court's decisions in *Connick* and *Pickering*.

If the Tenth Circuit and Wren are to believed, the mere fact that a public employee is retained precludes *any* consideration of the government's interest in applying the *Pickering* balance. However, neither this Court, nor any other circuit court, has taken such a position. All other federal appellate courts since *Connick* have recognized that *full* consideration must be given to the government's interest in determining whether the employee was engaged in protected activity. Such consideration involves matters pertaining to the nature of the disruption caused by the employee's speech and its effect on the working environment – none of which is addressed or resolved by simply noting the fact that the employee continued to be employed after speaking on a matter of public concern.

It is understandable that given the utter failure of the Tenth Circuit to consider any of those factors this Court deemed important in applying the *Pickering* balance, Wren weakly attempts to rationalize this failure by asserting that no consideration of the *Connick* factors was required when Wren was retained. However, this simply reflects a lack of understanding of the *Pickering-Connick* principles applicable to determining whether the speech is constitutionally protected. Consideration of both the interests of the employee *and* the interests of the government must be made.

The nature of Wren's opposition makes clear how the decision of the Tenth Circuit, if left uncorrected, will establish a dangerous precedent that will serve to undermine the guidelines mandated by this Court to

resolve an issue of such critical importance to all public administrators. The need for plenary review is without question.

B. THE REMAINING QUESTIONS PRESENT REVIEWABLE ISSUES FOR THIS COURT.

The question of whether Spurlock's conduct toward Wren rose to a level of constitutional infringement was presented to the Tenth Circuit, notwithstanding Wren's assertion in her opposing brief to the contrary (Brief in Op., p. 12). The Tenth Circuit held that the evidence of Spurlock's retaliatory conduct was sufficient and cited the evidence it believed pertained to this conclusion. This conclusion required determination of the degree of conduct required before constitutional infringement is reached in First Amendment retaliation cases. The court below decided that the continuation of harrassment that pre-existed the exercise of Wren's speech constituted infringement.

This Court has not previously set forth guidelines for lower courts to follow in determining the scope of conduct required to constitute First Amendment infringement. The court below required no evidence that Spurlock's alleged retaliatory conduct directly affected Wren's employment in a material way. Thus, the Tenth Circuit allowed for the constitutionalization of a pre-existing and long-standing employee grievance, something *Connick* had warned against.

In addition, contrary to Wren's claim in her response (Brief in Op., pp. 13-14), Petitioner is not raising new matters with respect to the instructions. Wren fails to understand that Petitioner set forth in his petition the entire instructions given by the trial court to establish a context for demonstrating that the specific instructions contested in the court below were plainly erroneous in light of all the instructions, and were the generating factor which culminated in a verdict not warranted under the law. *See Pridgin v. Wilkinson*, 296 F. 2d 74, 76 (10th Cir. 1961). A gross

injustice is manifested where the jury was so obviously misled by the instructions.

In addressing the issue of indivisible injury, Wren in her response tracks the confusion of the Tenth Circuit (Brief in Op., pp. 15-16). Wren fails to recognize that the issue Petitioner has presented here concerns not contribution from a joint tortfeasor, but the Defendant's right to have the Plaintiff's judgment reduced to reflect a prior recovery for the same injury. Wren's misunderstanding is obvious in her attempt to characterize this issue as one interpreting the Wyoming law of contribution. Wren's reliance upon *Robertson v. Wegmann,* 436 U.S. 584, 588 (1978), is thus misplaced. The issue presented by Petitioner has *nothing* to do with the Wyoming law. It does concern whether the nature of the constitutional injury claimed by Wren is indivisible thereby entitling Petitioner to a set-off. Resolution of this question, therefore, *is* a matter of federal law, and has no relevance to the law of contribution that may exist under state law. Furthermore, contrary to Wren's assertion in her response, determining whether the claimed constitutional injury is indivisible is not a factual determination but, instead, is a matter of legal characterization by applying applicable federal standards.

Because this Court has not previously handed down guidelines for lower courts to apply to determine whether a constitutional injury is divisible or indivisible, the Tenth Circuit applied faulty analysis which resulted in an erroneous conclusion based on wholly irrelevant considerations.

C. CONCLUSION

Wren's response highlights the attempt public employees will make in the future to use the precedent established by the court below to unfairly tip the *Pickering* balance in their favor by ignoring the government's interest. Unless this Court acts

immediately to rectify the corrosive effect the decision below will have on future applications of the *Pickering* balance, public employeees will cite with credibility the argument Wren sets forth in her opposition to this petition, to wit: that consideration of the government's interest is precluded under any circumstance where the government chooses to retain the employee. Review by this Court of issues of such substantial importance to public administrators throughout the country is essential.

Respectfully submitted,

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